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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2017

HAROLD WEXLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

HAROLD WEXLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Harold Wexler ("Wexler") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit ("Circuit Court") entered in this action on May 22, 1980.

OPINION BELOW

The opinion of the Circuit Court, not yet reported, appears as Appendix A hereto. No opinion was rendered by the District Court for the Eastern District of New York.

JURISDICTION

The judgment of the Circuit Court was entered on May 22, 1980, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Circuit Court erred by holding, in the absence of any authority, that an equipment lease ("Equipment Lease")[1] is a "security" within the meaning of 18 U.S.C. §§2311 and 2314.

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1. See Appendix B post.

STATUTES INVOLVED

This case involves the interpretation of 18 U.S.C. §§2311 and 2314, which provide, in pertinent part:

18 U.S.C. 2311

> "'Securities' includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing;"

18 U.S.C. 2314

* * *

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;

* * *

Shall be fined not more than $10,000 or imprisoned not more than ten years or both."

STATEMENT OF THE CASE

Wexler and his co-defendant, Alan Angrist ("Angrist")[2] were convicted on December 18, 1979, after a jury trial, in the United States District Court for the Eastern District of New York (Pratt, J.) of (1) unlawful interstate transportation of forged securities [Court 3], (2) making false representations to a bank insured by

2. Counsel for Wexler is informed that Angrist is simultaneously filing a writ of certiorari with this Court predicated upon the instant affirmance of the Circuit Court.

the Federal Deposit Insurance Corporation [Count 4], and (3) conspiracy to commit those offenses [Count 1]. Both Wexler and Angrist were acquitted on a separate unlawful transportation count (Count 2) and each was sentenced on Counts 1 and 3 to concurrent terms of two years imprisonment to be followed by three years probation on Count 4.

On May 22, 1980, the judgments of conviction were affirmed by the Circuit Court (Lombard and Mulligan, Circuit Judges, and Spears, District Judge sitting by designation).

The salient facts before the Circuit Court can be briefly stated:

Wexler and Angrist were, respectively, the founders and Vice President and President of Alphabetland Incorporated ("Alphabetland, Inc."), a New York corporation organized to operate nursery

schools utilizing newly accepted forms of pre-school teaching techniques.

In 1970, after years of planning, Wexler and Angrist opened the first Alphabetland, Inc. school -- actually a small "storefront" nursery school in a shopping center in West Hempstead, Long Island. Business was initially successful. However, capital was scarce and in 1972 the founders failed in their efforts to raise additional funds. In an attempt to expand, Alphabetland, Inc. engaged in franchising which involved the selling of an existing school or the starting-up of a new school in return for cash and promissory notes. In the case of franchising, Alphabetland, Inc. sold a particular nursery school to a purchaser for cash and notes, or would arrange through a subsidiary corporation, Alphabetland Pre-School Franchises, Inc.

("Alphabetland Franchises, Inc.") for the leasing to the franchisee of nursery school equipment which was financed by the franchisee entering into an Equipment Lease with Alphabetland Franchises, Inc.[3] Pursuant to the Equipment Lease, Alphabetland Franchises, Inc., leased to the franchisee specific equipment for use in the Alphabetland, Inc. educational regimen for which the franchisee agreed to pay rent in accordance with the terms of the lease -- usually for a period of 60 months.

Thereafter, in 1974 Alphabetland, Inc., still in need of operating capital, hired Michael Paschel, a certified public accountant who professed a knowledge and ability to raise financing

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3. An Equipment Lease between Alphabetland Franchises, Inc., and one of its franchisees was Government's Exhibit "6" on trial and, as above indicated, is annexed hereto as Appendix "B."

through equipment leasing. Paschel involved Alphabetland, Inc., with one Alfred Grunow ("Grunow"), an equipment leasing broker.

Paschel and Grunow made arrangements for loans from the various lending institutions, (i.e., Middle States Leasing Company and Maryland National Bank) utilizing (a) documents which Angrist testified were "at Grunow's direction," delivered to the latter, signed "in blank," and (b) personal guarantees by both Wexler, Angrist and their respective spouses.

In 1976 Alphabetland, Inc. filed for bankruptcy and it appeared on trial that certain of the loan documents used in connection with the loans from Maryland National Bank and Middle States Leasing were claimed to be non-genuine by the purported makers.

The trial record established, among other things, that (1) the Government conceded that neither Wexler nor Angrist "made a profit" from the alleged criminal activity, (2) that Grunow took over Alphabetland, Inc. after becoming a major stockholder in 1975, (3) the former Vice President of Middle States Leasing who approved the loan to Alphabetland, Inc., (i) left Middle States Leasing and was hired by Grunow to operate Alphabetland, Inc. for the latter, and (ii) in July 1976, upon Grunow's orders, caused Angrist to be physically locked out of Alphabetland, Inc.

On trial, counsel for both Wexler and Angrist conceded that an Equipment Lease was a "security" within 18 U.S.C. 2311.

The Circuit Court's Opinion as to the "Equipment Lease-Security" Issue

In its opinion, the Circuit Court recognized the argument of respective

appellate counsel that trial counsels' "concession" (that an Equipment Lease was a "security" under 18 U.S.C. 2311) was ineffective since a "prosecutor, judge and defense counsel acting in concert may not create a crime where none exists" (A9). However, the Circuit Court disposed of this contention in the following manner (A10).

> "The concession simply made it unnecessary for the government to prove that the equipment lease was a security. Since it is our view that the equipment lease was a security within the meaning of §2311, the defendants were in no way prejudiced by the concession, whether the issue was waived or not."

Significantly, the Circuit Court expressly stated that (1) an Equipment Lease is not specifically included within the definition of a "security" in 18 U.S.C. §2311, and (2) there existed no decision which addressed this specific issue, viz.: whether an Equipment Lease

was a "security" within §2311 (A10-A11).

Nevertheless, upon analysis, the Circuit Court held (A13):

> "In view of the nature of the equipment, we believe the equipment leases obviously transferred an 'interest in goods, wares and merchandise,' and thus could be considered securities with the meaning of §2311. More important, however, is the fact that the equipment leases have 'intrinsic value' and 'are recognized and used as such in the regular channels of commerce.' United States vs. Canton, supra. The loan officer at Middle States Leasing testified that the leases could have been sold to any other financial institution, and that the loans would not have been made without the equipment leases as collateral."

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court erroneously concluded that an Equipment Lease is a "security" within 18 U.S.C. 2311. Moreover, there exist vague and varied standards applied by the various Circuit Courts in determining whether a particular document qualifies as

a "security" within §2311. Lastly, the national importance of equipment leasing renders it particularly appropriate that the Supreme Court accept this opportunity to clarify and standardize the rules for determining what constitutes a "security" within §2311, and, specifically, whether an Equipment Lease is such a security.

Circuit Court Divergent Standards

Significant and critical differences exist among the various Circuits as to the standard to be applied in determining what constitutes a "security" under §2311 (see United States v. Dunlap, 573 F.2d 1092, 1093-1094 [9th Cir. 1978]; United States v. Canton, 470 F.2d 861, 865 [2d Cir. 1972]; United States v. Jones, 450 F.2d 523, 524-525 [5th Cir. 1971]; Merrill v. United States, 338 F.2d 763, 769 [5th Cir.] cert. denied, 386 U.S. 994 (1964) adopting the "narrow" or "strict" standard

for determining what constitutes a "security" within §2311; cf. United States v. Speidel, 562 F.2d 1129, 1131 [8th Cir. 1977], cert. denied, 435 U.S. 915, 98 S.Ct. 1468 [1978]; United States v. Austin, 462 F.2d 724, 736 (10th Cir.), cert. denied, 409 U.S. 1048 [1972] adopting the "expansive" or "broad" standard for determining what constitutes a "security" under §2311). The existence of these dual interpretations among the Circuits works an especially pernicious injustice in a criminal case for the obvious reason that the defendant is denied the benefit of doubt being resolved in his favor[4] (Prussian v.

4. Interestingly, even within those Circuits adopting the "broad" construction of §2311, confusion exists as to the standard to be applied (cf. United States v. Jackson, 576 F.2d 749, 755 [8th Cir.], cert. denied, 439 U.S. 858, 99 S.Ct. 175 [1978]; cf.

United States, 282 U.S. 675, 677 [1931]; McBoyle v. United States, 283 U.S. 25, 27 [1931]). A further, but an equally important reason to issue the writ, is that the Circuit Court's interpretation of §2311 is so expansive and uncertain in scope as to have deprived Wexler of the prior warning that his conduct could reasonably be conceived as violative of law. In United States v. Spector, 343 U.S. 169, 171 (1952) this Court aptly noted:

> " . . . a statute, plain and unambiguous on its face, may be given an application that violates due process of law, . . . "

It is respectfully submitted that this Court should standardize and make uniform

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Beam v. United States, 364 F.2d 756, 758 [8th Cir. 1966], noting the division among the Circuits with respect to what constitutes a "security" within §2311.

the criteria to be applied in determining what constitutes a "security" within §2311 as the issue is a recurring one affecting a great number of persons in relation to a frequently utilized federal criminal statute (cf. STERN & GRESSMAN, SUPREME COURT PRACTICE [5th ed. 1978] §§4.4, 4.11, 4.13, and authorities cited therein).

Importance of Equipment Leasing and Total Lack of Apposite Authority

Two further factors demonstrate the national importance of the issues presented in the instant case, viz.: (1) there exists no known authority (other than the instant case) directed to the issue of whether an Equipment Lease is a "security" within §2311, and (2) equipment leasing is a relatively new and widely utilized commercial procedure of national dimension. The Circuit Court acknowledged this fact in

its opinion (A12):

> "As one author has stated, '[t]he importance of leasing as a way of financing facilities and equipment needed by commerce and industry can hardly be overstated. In the last ten years it has mushroomed at an accelerating pace.'"

Thus, it is additionally submitted that the national importance of equipment leasing and the total absence of any apposite authority render the issues presented by this case particularly appropriate for this Court to grant the instant writ. See generally Lefevre, The Tax Law of Lease Transactions Revisited, 53 TAXES 764 (1975); Robertson, Leasing Arrangements - From The Investor's Viewpoint, 46 TAXES 787 (1968); Zeitlin, Equipment Leasing as a Tax Shelter, 18TH UNIVERSITY OF SOUTHERN CALIFORNIA TAX INSTITUTE 721 (1968); Note, The Financing Lease As A Security Agreement, 56 Neb. L.Rev. 354 (1977); Coogan, Leases

of Equipment and Some Other Unconventional Security Devices: An Analysis of UCC Section 1-201(37) and Article 9, BENDER'S SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE §4A.01(1977).

Circuit Court's Erroneous Conclusion that an Equipment Lease is a Security Within §2311

An analysis of the Equipment Lease (App. B) reveals that it does not qualify as a "security" within §2311. However, the Circuit Court concluded that the Equipment Lease was a "security" within §2311 (as opposed to a "true" lease or bailment for hire) for the following reasons (A13):

> "In view of the nature of the equipment, we believe the equipment leases obviously transferred an 'interest in goods, wares, and merchandise,' and thus could be considered securities within the meaning of §2311. More important, however, is the fact that the equipment leases have 'intrinsic value' and 'are recognized and used

> as such in the regular channels of commerce.' United States v. Canton, supra."

Initially, it should be noted that the Equipment Lease was not made by Alphabetland, Inc., but by Alphabetland Franchises, Inc., a corporation with no substantial assets and thus no ability to obtain credit in the financial world (even though it was lessor of the Equipment Leases). Thus, the Second Circuit's opinion that the Equipment Lease had "intrinsic value" (A13) is not substantiated (cf. United States v. Canton, 470 F.2d 861, 864 [2d Cir. 1972]). In this regard, the Circuit Court concluded that the Equipment Lease was not a "true" lease but was intended to be used as a security (A13). This conclusion is not supported by an analysis of the documents. Significantly, the Equipment Lease does not contain an option on the part of the

lessee to purchase, a factor given great weight under New York law in determining whether an Equipment Lease is a "true lease" or a "lease intended as a security". See N. Y. Uniform Commercial Code §1-201 (37) (McKinney's Supp. 1979), which, inter alia, provides:

> "Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

Commentators in the area have observed:

> "Leases not containing an option to purchase consistently have been held not to be intended as security and therefore not subject to Article 9 of the Code [Uniform Commercial Code]. In the absence of convincing evidence that the lease was intended as a security agreement, leases not containing

> purchase options generally have been upheld as 'true leases.'"

Note, The Financing Lease as a Security Agreement, 56 Neb. L. Rev. 354, at 355; see also Stine, Ship and Equipment Leasing as a Tax Shelter, 31ST ANNUAL N.Y.U. FEDERAL TAX INSTITUTE 755, 766 (1973).

Ultimately, the Circuit Court held that an Equipment Lease was a "security" under §2311 as an instrument "transferring or assigning any right, title or interest in or to goods, wares, and merchandise" (A13). It is submitted that this was error.

The phrase "transferring or assigning any right, title or interest in or to goods, wares, and merchandise," relied upon by the Circuit Court, although traditionally construed in a broad sense, has nevertheless been held to apply to a comprehensive designation of

such personal property as ordinarily would be the subject of commerce. (See generally Annot., What are Goods, Wares, Merchandise or Securities Within Meaning of 18 U.S.C. §2314 Making Transportation of Stolen Goods a Criminal Offense, 6 ALR FED 194 [1971]). On analysis, this phrase, even given a broad interpretation, does not encompass a lease which defines the obligations of the possessor of another's property without effecting an assignment, and creates mutual obligations between the parties with respect to the subject matter.

CONCLUSION

Because of the nationwide importance and recurring nature of the issues presented, it is critical that this Court grant the writ of certiorari to review the opinion of the Circuit Court.

Dated: New York, New York
June 19, 1980

Respectfully submitted,

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APPENDIX A

CIRCUIT COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 993, 1009—September Term, 1979

(Argued April 15, 1980 Decided May 22, 1980)

Docket Nos. 80-1001, 1002

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

HAROLD WEXLER,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ALAN ANGRIST,

Defendant-Appellant.

Before:

LUMBARD, MULLIGAN, *Circuit Judges,*
and SPEARS,* *District Judge.*

* Honorable Adrian A. Spears, District Judge for the Western District of Texas, sitting by designation.

Appeals of judgments of conviction entered after jury trial in the United States District Court for the Eastern District of New York, George C. Pratt, *Judge*.

Affirmed.

JOEL J. SPECTOR, New York City (Demov, Morris, Levin & Shein, New York City, Arthur Birnbaum, New York City, of counsel), *for appellant* Wexler.

JOHN M. BURNS, III, New York City, *for appellant* Angrist.

ARLENE R. LINDSAY, Asst. U.S. Atty., New York City, (Edward R. Korman, U.S. Atty., E.D.N.Y., Mary McGowan Davis, Cheryl M. Schwartz, Asst. U.S. Attys., New York City, of counsel), *for appellee*.

SPEARS, *District Judge*:

Defendants Alan Angrist and Harold Wexler appeal from judgments of conviction after a jury trial of unlawful interstate transportation of forged securities (Count 3), making misrepresentations to a bank insured by the Federal Deposit Insurance Corporation (Count 4), and conspiracy to commit those offenses (Count 1). The defendants were acquitted on a separate unlawful transportation count (Count 2), and each was sentenced on Counts 1 and 3 to concurrent terms of two years in prison to be followed by three years probation on Count 4.

On appeal the defendants raise the following arguments: (1) that an equipment lease is not a "security" within the meaning of 18 U.S.C. § 2314, and that there

was insufficient evidence to establish that the defendants transported a forged equipment lease in interstate commerce (Count 3); (2) that the district court erred in permitting government counsel to introduce evidence of uncharged similar acts; (3) that the counts charging violations of 18 U.S.C. § 1014 (Count 4) and 18 U.S.C. § 371 (Count 1) are legally insufficient and should be dismissed; (4) that the evidence was insufficient to convict defendants of either the conspiracy count (Count 1) or the misrepresentation to a bank count (Count 3); (5) that Angrist's conviction should be reversed because he did not receive adequate representation during trial; and (6) that the district court erred in failing to charge the jury with respect to the use of inferences, the limited use of uncharged similar acts evidence, and the definition of a security within the meaning of 18 U.S.C. § 2314. Finding these arguments to be without merit, we affirm.

In 1970, Wexler and Angrist formed Alphabetland, Inc., a corporation organized to operate pre-school nurseries and summer day camps, primarily in the New York area. Angrist held the position of president and Wexler acted as executive vice-president and secretary of the corporation. When fund raising efforts failed in 1972, the defendants began to offer Alphabetland franchises, which involved the selling of an existing school or the starting-up of a new school in return for cash and a series of promissory notes. Where a new school was involved, Alphabetland would offer a nursery school equipment package and the franchisee often financed this package by entering into an "equipment lease" with Alphabetland. Under the equipment lease, title to the equipment was retained by Alphabetland and the franchisee was obligated to make lease payments over a 60 month period. Tuition payments were sent directly to Alphabetland, which de-

ducted any royalty, lease and note payments due and then forwarded the balance to the particular franchisee.

In 1974, Alphabetland was still experiencing financial difficulty, and in an effort to increase its operating capital Michael Paschel, a certified public accountant, was employed to assist in seeking financing. Alfred Grunow, an equipment leasing broker, also became associated with Alphabetland. Paschel and Grunow were instrumental in Alphabetland's efforts to obtain financing, but the evidence established that the loans were negotiated and finalized by the defendants. Between 1974 and 1975, Alphabetland obtained four loans from three separate companies.

These loans, and documents submitted in connection with the loan applications, formed the basis for the indictments returned in this case.

Middle States Leasing Loan

In February, 1974, Grunow arranged for Alphabetland to discount franchisees' notes to Middle States Leasing Corporation (MSL). Arrangements were also made for MSL to lend money to Alphabetland against the equipment leases of its franchisees. A vice-president of MSL testified that MSL loaned $90,000 to Alphabetland against the discounted notes, and approximately $270,000 in connection with both the notes and the leases. The same officer also testified that he had several conversations with both defendants, and that Angrist agreed to submit copies of four promissory notes which were to form the major portion of the collateral.

The copies, which were mailed to MSL, allegedly represented the promissory notes of four Alphabetland franchisees, executed in connection with the purchase of four

schools. Both defendants, who were residents of Long Island, New York, attended the loan closing in Passaic, New Jersey, at which time the defendants submitted the original four promissory notes. The evidence at trial established that the signatures on two of these notes had been forged. One of the notes had been signed by Frances Welner, a secretary at Alphabetland. After having been granted immunity, Mrs. Welner testified that one of the defendants (she thought Angrist) had asked her to sign the name of the franchisee on the note. Arthur Kirsch, another Alphabetland employee, who also testified under a grant of immunity, stated that he saw the secretary sign the note and that both defendants were present when it was signed.

In connection with the equipment leases, MSL agreed to discount five leases, with defendants receiving $30,000 per lease.[1] In return, MSL received an assignment of the franchisees' equipment leases, which gave MSL the right to collect over $40,000 in lease and interest payments from each franchisee. Each lease to be discounted was accompanied by a series of documents, and when MSL decided that it would discount a particular lease, both defendants would travel to the MSL office and produce the original supporting documents. It was subsequently determined that each of the equipment leases, as well as the supporting documents, were forgeries. All of the persons whose purported signatures were on the leases testified at trial, stating that they did not sign the equipment leases or the other documents submitted to MSL. MSL's vice-president testified that if the leases had been genu-

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1 Although under the typical equipment lease a franchisee paid approximately $30,000.00 for the package, excluding interest, it was established at trial that Alphabetland paid approximately half that much for each equipment package.

ine, they would have had commercial value, in that they represented the right to receive payments for the equipment. In addition, he testified that the leases were marketable, in that they could be discounted to yet another financial institution. Although the point is disputed, it appears from the evidence that the forged leases and supporting documents were delivered to MSL by both defendants. The government's handwriting expert testified that the signature on one set of documents had been forged by Angrist.

London Company Loan

In May, 1974, defendant obtained a $100,000 loan from the London Company, headed by Edward Chwatt. This loan was secured by a general pledge of all of Alphabetland's present and future assets, and seven promissory notes which turned out to be forged.[2]

Maryland National Bank Loan

After the lease discounting arrangement with MSL was concluded, Grunow introduced Wexler and Angrist to Richard Nee of the Maryland National Bank (MNB). Nee testified that although most of his contacts were with Angrist, on occasion he spoke with Grunow concerning the loan application. He testified that most of the data he received was sent by Angrist, and that the defendants failed to advise him of the existence of the outstanding obligation to the London Company. The documentation

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2 Defendants were not charged with unlawful transportation of these documents. This loan was relevant in that the government alleged that defendants intentionally failed to advise a federally insured national bank of its existence in a subsequent loan application.

submitted to MNB consisted of financial statements, a list of opening dates for recently constructed schools, a list of schools then under construction, a notes receivable list, a mortgages and notes payable list, and a term guaranty agreement.

Wexler and Angrist represented to MNB that with respect to the list of schools under construction, the land for each had been purchased, and that in most cases construction was actually under way. An Alphabetland employee testified that none of the schools on the two lists were actually under construction, although some of them were eventually opened. The list of notes receivable was also fraudulently prepared, in that MNB was advised that several of them were not already pledged as collateral, when in fact they were. Prior to approving the loan, MNB conducted a Uniform Commercial Code filing search, and it was discovered that the London Company had filed a lien against all present and future assets of Alphabetland. When confronted with this discovery, defendants explained that the London Company was acting merely as a guarantor for certain loans. In support of this explanation the defendants provided MNB with a copy of a "term guaranty agreement," which was purportedly signed by Mr. Chwatt, the holder of the London Company Loan, and which confirmed the false terms described by the defendants. The loan application was approved, and both defendants attended the loan closing. Mr. Chwatt testified that although the signature appeared to be his, he never signed such a document.

In spite of these various maneuvers (or perhaps resulting from them) Alphabetland's financial condition deteriorated to the point where in 1976 a petition in bankruptcy was filed on its behalf.

The Equipment Lease—Security Issue

Despite a concession at trial[3] that this was not an issue, both defendants strenuously argue that an equipment lease is not a "security" within the meaning of 18 U.S.C. § 2311. The National Stolen Property Act, 18 U.S.C. § 2314, proscribes the transportation in interstate or foreign commerce of stolen goods, wares, and merchandise with a value of $5,000 or more, stolen securities, or falsely made, forged, altered, or counterfeited securities. 18 U.S.C. § 2311 defines the term "securities" to include:

> . . . any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing; . . .

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3 The record reflects and the briefs confirm the fact that defendants' counsel repeatedly conceded that equipment leases were included within the meaning of "securities" as used in Title 18 U.S.C. §§ 2311 and 2314.

Counsel for the government insists that under *United States v. Knuckles*, 581 F.2d 305 (2d Cir.), *cert. denied* 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978), defendants are precluded from abruptly shifting their position to claim that an equipment lease is not a security. In *Knuckles*, we held that "[c]ounsel may not adopt one view of the proof in the trial court, thereby limiting the legal issues, and then adopt a different view of the evidence in order to raise other issues on appeal." 581 F.2d at 310. This was an amplification of our holding in *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959, 97 S.Ct. 2686, 53 L.Ed.2d 277 (1977) that:

> Rule 12(f), F.R.Crim.Pro. makes clear that '[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial, . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.' The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal. (citations omitted)

The defendants argue that the concession by trial counsel has no effect on the present appeal because under Rule 12(b)(2), Fed.R.Crim.P., an objection that an indictment fails to charge an offense may be raised for the first time on appeal, and because a "prosecutor, judge and defense counsel acting in concert may not create a crime where none exists." Whatever force this argument may have in other contexts, it is evident that it is not helpful to the defendants here. A motion to dismiss for failure to charge an offense, although cognizable for the first time on ap-

peal, does not lie where, as in this case, the indictment tracks the language of the statute and sufficiently sets forth the elements of the crime charged. As government counsel correctly points out, the issue is not whether count three on its face fails to charge an offense, since it clearly does, but whether the government can *prove* that a violation thereof occurred by relying on evidence concerning the equipment leases. One of the obvious elements of the offense charged under 18 U.S.C. § 2314 is interstate transportation of "falsely made, forged, altered, or counterfeited securities." Count three charged that defendants, "with unlawful and fraudulent intent, did transport in interstate commerce from West Hempstead, New York to Passaic, New Jersey, a falsely made and forged security, namely, an equipment lease bearing the name David Kelly, knowing said lease to be falsely made and forged." This count specifically and adequately described all of the essential elements of the offense it was alleged that the defendants committed. Thus we are not confronted with a situation where "a prosecutor, judge and defense counsel acting in concert" created a crime where none existed; a person who transports a forged security in interstate commerce with unlawful and fraudulent intent, and knowing the same to have been forged, has committed a crime under 18 U.S.C. § 2314. The concession simply made it unnecessary for the government to prove that the equipment lease was a security. Since it is our view that the equipment lease *was* a security within the meaning of § 2311, the defendants were in no way prejudiced by the concession, whether the issue was waived or not.

An "equipment lease" is not specifically included in the definition of "securities" in 18 U.S.C. § 2311, so we must determine whether such a lease is a writing which constitutes "evidence of indebtedness," or which evidences

"ownership of goods, wares, and merchandise, or [the] transferring or assigning [of] any right, title or interest in or to goods, wares and merchandise." We have not been directed to any reported decision which addresses this specific issue, but in the case of *United States v. Canton*, 470 F.2d 861 (2d Cir. 1972), this Court, in holding that a motor vehicle registration was neither a "certificate of interest in property" nor a "document or writing evidencing ownership of goods, wares and merchandise," and, therefore, not a security within the meaning of § 2311, nevertheless, did furnish some guidance by noting that securities are "instruments which have *intrinsic value* and *are recognized and used as such in the regular channels of commerce*." 470 F.2d at 864.[4] (Emphasis added).

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[4] In *United States v. Elliot*, 571 F.2d 880 (5th Cir.), *cert. denied, sub nom., Hawkins v. United States*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978), an automobile title certificate issued under Georgia law was distinguished from the New York automobile registration certificate with which this Court dealt in *Canton*. A certificate of title in Georgia was just that, while a registration certificate in New York was only for the purpose of showing that "the motor vehicle may rightfully be operated on public highways" and "was never intended . . . as a certificate of title." Thus, a certificate of title was held in *Elliot* to be a security, whereas, in *Canton* a registration certificate did not qualify under the security definition. In this connection, it is interesting to note that the Court gave an expansive reading to § 2311 in *United States v. Speidel*, 562 F.2d 1129 (8th Cir. 1977), *cert. denied*, 435 U.S. 915, 98 S.Ct. 1468, 55 L.Ed.2d 505 (1978), and found that a quitclaim deed was a security. However, in *United States v. Dunlap*, 573 F.2d 1092 (9th Cir. 1978), the Court refused to follow the expansive reading concept and held that a department store script was not covered by the definition in § 2311. On the other hand, in *United States v. Austin*, 462 F. 2d 724 (10th Cir. 1972), *cert. denied*, 409 U.S. 1048, 93 S.Ct. 518, 34 L.Ed.2d 1048 (1972), the Court was of the opinion that a loan commitment letter, which was sold for a substantial consideration, and which "appeared to be an enforceable obligation" that contemplated a flow of funds, was a security within the statutory definition. Credit sales invoices were held not to be securities in *Merrill v. Unites States*, 338 F.2d 763 (5th Cir. 1964), the Court stating that "Congress employed the term 'securities' in the usual commercial sense, to refer to instruments in themselves valuable to a thief." 338 F.2d at 769. That same Court later

In 1969, a New York Court described equipment leasing as being:

> a recent device whereby users of goods are enabled to have sole and exclusive use thereof for such periods of time as are economically beneficial to them at advantageous costs. It has become a widely used substitute for purchase, with the lessor, in economic reality, taking the place of a financing agency and the lessee paying the equivalent of the full purchase price, plus interest, within the minimum lease period. The lessee, in effect, is the true purchaser. Under present tax laws . . . it is foreseeable that this method of transferring the right to use goods will encompass a sizeable portion of the volume of commercial transactions which have the use of goods (rather than their consumption) as their immediate economic end. *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House*, 298 N.Y.S.2d 392 (Civil Court of City of N.Y.), *rev'd on other grounds*, 316 N.Y.S.2d 585 (N.Y.Sup.Ct. 1970).

As one author has stated, "[t]he importance of leasing as a way of financing facilities and equipment needed by commerce and industry can hardly be overstated. In the last ten years it has mushroomed at an accelerating pace." Lefevre, *The Tax Law of Lease Transactions Revisited*, 53 TAXES 764 (1975).

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held in *United States v. Jones*, 450 F.2d 523 (5th Cir. 1971), that an airline ticket was not a security, pointing out that not all instruments having value are securities, and concluding that an instrument in order to be a security must not only have value in itself, but it must also "evidence indebtedness in the usual commercial sense." 420 F.2d 525. Other cases could be cited covering various categories of documents, but it appears that the decision in each case depends upon the particular facts of that case.

It should be noted that under the terms of the equipment leases in this case, the lessee had no option to terminate the lease, and in the event of a default by the lessee, Alphabetland could take possession of the equipment and sell it, retain all prior payments of rent, and hold the lessee for the balance of the unpaid rent. Since the lease specifically provided that the equipment was to be considered personal property, it is difficult to understand defendants' argument that the equipment should be considered fixtures. In view of the nature of the equipment, we believe the equipment leases obviously transferred an "interest in goods, wares and merchandise," and thus could be considered securities within the meaning of § 2311. More important, however, is the fact that the equipment leases have "intrinsic value" and "are recognized and used as such in the regular channels of commerce." *United States v. Canton*, *supra*. The loan officer at Middle States Leasing testified that the leases could have been sold to any other financial institution, and that the loans would not have been made without the equipment leases as collateral. His testimony further demonstrated that the leases were valuable, in that Alphabetland would receive payments on the equipment it was renting to the franchisees with an interest return. The fact that Alphabetland used the leases as collateral for loans from Middle States Leasing would seem to foreclose defendants from now asserting that the leases were without value.

In short, defendants ask this Court to look to form over substance—to hold that the equipment leases were "true" leases or bailments for hire. The fact is that the leases in this case were not bailments for hire, but were intended to be used as security. As one author has noted, "it is not uncommon to find that what is called an ordinary lease . . . is in substance a lease . . . for security—that is,

to most pre-code and post-code lawyers, 'a conditional sale' . . . " Coogan, *Leases of Equipment and Some Other Unconventional Security Devices: An Analysis of UCC Section 1-201(37) and Article 9* in BENDER'S SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 4A.01 (1977). In our opinion, each equipment lease in this case is the type of instrument Congress intended to and did include in the definition contained in § 2311.

Interstate Transportation

The defendants contend that even if this Court determines that an equipment lease is a security within the meaning of § 2311, Count three must be dismissed because the evidence failed to establish that the defendants knowingly transported the forged equipment leases in interstate commerce. As previously pointed out, the loan officer at Middle States Leasing testified that both defendants were present at the loan closings, and that they presented the original supporting documentation at that time. On at least one occasion, the loan closing was attended solely by the defendants and representatives of Middle States Leasing, and the defendants were the only persons present at the closing who had access to or were in a position to produce the original equipment lease. The evidence established that the offices of Alphabetland were in Long Island, that both defendants resided in Long Island, and that the loan closings were held in Passaic, New Jersey. The obvious inference to be drawn from this evidence was that the defendants travelled from Long Island to New Jersey in order to deliver the documents to Middle States Leasing. The evidence was clearly sufficient to present a jury issue, and the jury resolved that

question against the defendants. The testimony of Alphabetland employees, as well as other evidence, established the fact that the defendants knew the lease agreements were forged when they were delivered to Middle States Leasing.

Uncharged Similar Acts

The defendants insist that the District Court erred in allowing evidence concerning forged promissory notes submitted in connection with the London Company Loan. Prior to the swearing of the jury, defendants objected to the government's intention to present evidence concerning the London Company loan on the ground that it would expose before the jury evidence of forged promissory notes given by Alphabetland to the London Company—a crime not charged in the indictment. Counsel for the government replied that this evidence was pertinent to Count four of the indictment, which charged defendants with misrepresenting the financial condition of Alphabetland to Maryland National Bank by failing to disclose the existence of the London Company loan. We believe that the District Court properly admitted the London Company loan evidence as being relevant to the charges contained in Count four of the indictment. As we held in *United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.), *cert. denied*, 439 U.S. 913, 99 S.Ct. 285, 58 L.Ed.2d 260 (1978),

> It is well established that evidence of other crimes, if relevant, is admissible against a defendant except when offered solely to prove criminal character or disposition. (citations omitted) One purpose for which such similar acts may be introduced is to prove knowledge, intent, identity, and plan or design. Fed.

R.Ev. 404(b); *United States v. Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851, 94 S.Ct. 144, 38 L.Ed.2d 100 (1973). 580 F.2d at 1149.

In addition to the fact that the evidence was properly admitted under the above mentioned theories, it is clear that the evidence in question was admissible as demonstrating a connected or inseparable transaction from the crimes charged in the indictment. *See United States v. O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978); *United States v. Calfon*, 607 F.2d 29 (2d Cir. 1979).

Sufficiency of the Fourth Count

Defendants maintain that the fourth count of the indictment should be dismissed because it does not sufficiently state the essential facts constituting the offense charged. This contention was not raised in the District Court and has therefore been waived. Rule 12(b)(2), Fed.R.Crim.P.; *United States v. Rodriguez*, 556 F.2d 638, 641 (2d Cir. 1977), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1233, 55 L.Ed.2d 762 (1978). Moreover, an examination of the defendants' arguments under this point reveals that they are patently without merit. Count four set forth the date and place of the offense, identified the bank that was misled, listed all of the essential elements of the offense, identified the specific documents used to mislead the bank, and stated the manner in which these documents were misleading.

Sufficiency of the Evidence

Viewing the evidence in a light most favorable to the government, as we must, there is no merit to the defen-

dants' arguments that the evidence at trial was legally insufficient to convict them of either the conspiracy count or the unlawful misrepresentation to a bank count.

Adequacy of Angrist's Representation at Trial

Angrist's claim that he did not receive adequate representation before or during trial is meritless. As we stated in *United States v. Rodriguez, supra*,

> In any complicated case every lawyer . . . is likely to make both procedural and substantive errors, often reflecting mistakes of judgment under pressure. He is also apt to make minor errors of omission. But that is no reason to embrace the specious argument that a defendant has been prejudiced if his counsel fails to raise even meritless points in an effort to preclude a just conviction. 556 F.2d at 642.

The Court's Charge

The defendants argue that the Court's failure to charge the jury concerning the means of determining whether an equipment lease was a "security" denied them a fair hearing. In this connection, it is significant that the defendants neither requested such a charge, nor interposed any objection when the Court indicated that in light of the concession made, he would charge the jury as a matter of law that an equipment lease was a security within the meaning of the statue. Regardless, therefore, of whether or not the question might normally be one for the jury, the action of the Court was proper under the circumstances of this case.

Conclusion

Having fully considered all contentions made by the defendants, and finding them wholly without merit, we are of the opinion that the judgments of conviction as to both defendants should be, and the same are hereby,

AFFIRMED.

APPENDIX B

EQUIPMENT LEASE

GOVERNMENT EXHIBIT SIX

ALPHABETLAND PRE-SCHOOL FRANCHISES, INC.
511 Hempstead Avenue
West Hempstead, New York 11552

No. Illegible Schedule_____

ALPHABETLAND PRE-SCHOOL FRANCHISES, INC. hereby leases to the undersigned Lessee, and Lessee hereby leases and rents from Lessor, the equipment described in the schedule listed below and additional lease schedules (hereinafter collectively called "Schedule")subject to the terms and conditions set forth below and continued on the reverse side hereof.

SCHEDULE

1. TERM: 60 Months.
2. RENTAL PAYMENTS: $823.00 per month for the first 60 months.
3. ADVANCE RENTALS: $1,623.00, payable at the time of signing of this schedule, to be applied to the first and last rental payments.
4. RENEWAL OPTION: None.
5. SECURITY DEPOSIT: $3,000.
6. EQUIPMENT LOCATION: 385 Mount Paran Road, Fulton County, Georgia.

SCHEDULE

SCHEDULE

7. LESSEE'S ADDRESS: Same.
8. EQUIPMENT DESCRIPTION: See attached schedule.
9. LIABILITY INSURANCE REQUIRED:
1,000,000 Personal Injury
30,000 Property Damage.

SCHEDULE

1. TERMS AND RENTAL NOTICES: Subject to the conditions herein stated, this lease shall be for a period stated in the Schedule commencing with delivery to Lessee, its agent or a carrier, whichever shall be earlier. Lessee agrees to pay the total rent for the term, which shall be in the total amount of all rental payments stated in the schedule, plus such additional rentals as are provided herein. All payments shall be made on the first of each month in advance at the office of the Lessor specified below or at such other place as Lessor or Lessor's assignee may in writing designate.

2. TITLE: Lessor shall at all times retain title to the equipment. All documents of title and evidence of delivery shall be delivered to the Lessor. Lessor will not change or remove any insignia

or lettering which is on the equipment at the time of delivery or which is thereafter placed thereon indicating Lessor's ownership thereof, and at any time during the lease term, upon request of Lessor, will affix to the equipment, in a prominent place, labels, plates or other markings supplied by Lessor stating that the equipment is owned by Lessor. Lessor may at Lessee's expense cause this lease to be filed, recorded, refiled, rerecorded or financing statements (which may be signed by the Lessor only if permitted by statute) to be filed as permitted or required by law. Lessee at its expense shall protect and defend Lessor's title, at all times keeping the equipment free from any legal process and/or encumbrances whatsoever, including,but not limited to liens, attachments, levies and executions, and shall give Lessor immediate written notice thereof and shall indemnify Lessor for any loss caused by the failure of the Lessee to take action as provided herein.

3. PURCHASE, DELIVERY AND PREPAYMENTS: Lessee requests Lessor to purchase the equipment from a vendor selected by Lessee and arrange for delivery, which shall be deemed complete upon arrival at Lessee's premises or when otherwise received by Lessee's agent. If Lessee requests Lessor to make any payments to vendor or supplier, or if Lessor makes any such payment prior to delivery and acceptance, and if Lessee for any reason does not accept the equipment, Lessee shall, on demand by Lessor, pay Lessor any amounts theretofore paid or owing by Lessor in respect to the purchase of such item of equipment and upon such payment, Lessee shall be subrogated to Lessor's claims, if any, against the manufacturer or other supplier thereof and Lessee shall become entitled to such item, as-is where-is, without warranty, express or implied, by the Lessor with respect to any matter whatsoever, and Lessee shall indemnify and save Lessor harmless from any and all liability to the supplier thereof.

4. CARE AND USE OF EQUIPMENT: Lessee, at its own cost and expense, shall maintain the equipment in good operating condition, repair,and appearance, and protect same from deterioration other than normal wear and tear; shall use the equipment in the regular course if its business only, within its normal capacity, without abuse, and in a manner contemplated by the manufacturer thereof; shall not make modifications, alterations or additions to the equipment (other than normal operating accessories or controls), without the written consent of Lessor, which shall not be unreasonably withheld; shall not so affix the equipment to realty so as to change its nature to real property, and agrees that the equipment shall remain personal property at all times regardless of how attached or installed; shall keep the equipment on the premises where delivered, and shall not remove the equipment without the written consent of Lessor, which shall not be unreasonably withheld. All modifications,

repairs, alterations, additions, replacements, substitutions, operating accessories and controls shall accrue to the equipment and become the property of the Lessor. Lessor shall have the right, during normal hours, to enter upon the premises where the equipment is located in order to inspect, observe or remove same, or otherwise protect Lessor's interest, and Lessee shall cooperate in affording Lessor the opportunity to do same. For the purpose of assuring Lessor that Lessor's equipment will be properly serviced, Lessee agrees to cause the equipment to be maintained pursuant to the manufacturer's standard preventive maintenance contract and/or recommendation.

5. NET LEASE: Lessee intends the rental payments in this lease to be net to the lessor. Lessee shall comply with..* all taxes, including but not limited to sales and use taxes, excise taxes,

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* Illegible on printer's available copy. Certified original on file with court.

personal taxes and assessments, ...* freight and transportation charges and any similiar charges imposed on the ownership, possession, or use of the .....* this lease. Lessee shall pay to Lessor all costs and expenses including attorney's fees as hereinafter defined. .....* session expenses in connection with the enforcement of Lessor's rights under this lease. In case any charges.....* to be paid by the Lessee under this lease shall remain unpaid after the due date thereof, Lessor shall have the right.....* pay the same and to charge such payments with interest at the highest legal rate from the date of said payment .....* with the next rental payment. The rental herein is based on the prime rate as of the date hereof. Lessee agrees.....* prime rate during the term hereof, the rental

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* Illegible on printer's available copy. Certified original on file with court.

shall be increased in accordance therewith, at the option of the .....*.

6. INDEMNITY: Lessee shall and does hereby indemnify and save Lessor harmless from any and all.....* ship, selection, possession, leasing, renting, operation, control, use, maintenance, delivery and/or return of.....* limited to, injuries causing personal injury, property damage and/or death but shall be credited with any.....* respect thereto from liability insurance secured by Lessee. That said indemnification shall include all costs and.....* less incurred by Lessor in connection with any suits or actions resulting from any such liability.

The additional terms and conditions on the reverse side hereof are incorporated in and made a part of this.....*

The undersigned agree to all the terms and conditions set forth above

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* Illegible on printer's available copy. Certified original on file court.

and on the reverse side hereof, and in witness.....* execute this lease. This lease shall be binding upon all parties, their successors, legal representatives and assigns.

ACCEPTED AT WEST HEMPSTEAD, N.Y.
ON January 27, 1975
ALPHABETLAND PRE-SCHOOL FRANCHISES, INC.
BY /s/ Illegible

Authorized Representative
(Please sign all 3 copies)

DATE January 27, 1975
EARLY EDUCATION SYSTEMS INC.
(Lessee)
BY /s/ David L. Kelly
ITS President
(Title)

(IF CORPORATION AFFIX CORPORATE SEAL)

7. INSURANCE: Lessee shall keep equipment insured against all risks of loss or damage from every cause whatsoever for not less than the aggregate amount of unpaid total rent for the balance of the term of this lease, and shall carry public liability insurance, both

personal injury and property damage.. ...*equipment. All said insurance shall be in form and amount and with companies satisfactory to Lessor. All insurance for loss or damage shall provide that Lessor shall be the loss payee and that losses, if any, shall be payable to Lessor, and all such liability insurance shall be in the joint names of Lessor and Lessee. Lessee shall pay the premiums therefor and deliver to Lessor the policies of insurance or duplicates thereof, or other evidence satisfactory to Lessor of such insurance coverage. Each insurer shall agree, by endorsement upon the policy or policies issued by it or by independent instrument furnished to Lessor, that it will give Lessor 30 days prior written notice of the effective date of any alteration of cancellation of such policy. The proceeds of such insurance, payable as a result of loss or of damage to equipment, shall be applied at the option of Lessor, (a) toward the replacement, restoration or repair of equipment which may be lost, stolen

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* Illegible on printer's available copy. Certified original on file with court.

destroyed or damaged or (b) toward payment of the obligations of Lessee hereunder. Lessee hereby irrevocably appoints Lessor as Lessee's attorney-in-fact to make claim for, receive payment of and execute and endorse all documents, checks or drafts received in payment for loss or damage under any said insurance policy. In case of the failure of Lessee to procure or maintain said insurance to comply with any other provision of this lease, Lessor shall have the right, but shall not be obligated, to effect such insurance or compliance on behalf of Lessee. In that event, all monies spent by, and expenses of, Lessor in effecting such insurance or compliance shall be deemed to be additional rent, and shall be paid by Lessee with interest at highest legal rate to Lessor with the next monthly payment of rent.

8. DEFAULT: If (a) Lessee shall default in the payment of any rent or in making any other payment hereunder when due, or (b) Lessee shall default in the payment when due of any indebtedness of Lessee to Lessor arising independently of this lease, or (c) Lessee shall

breach any warranty hereunder, or (d) Lessee shall default in the performance of any other covenant herein and such default continues for 5 days after written notice thereof to Lessee by Lessor, or (e) Lessee becomes insolvent or makes an assignment for the benefit of creditors, or (f) Lessee applies for, or consents to, the appointment of a receiver, trustee, conservator or liquidator of Lessee or of all or a substantial part of the assets of Lessee, or if such receiver, trustee, conservator or liquidator is appointed without the application or consent of Lessee, or (g) petition is filed by or against Lessee under the Bankruptcy Act or any amendment thereto (including, without limitation, a petition for reorganization, arrangement or extension), or under any other insolvency law or law providing for the relief of debtors, then, if and to the extent permitted by applicable law, Lessor shall have the right to exercise any one or more of the remedies as provided hereafter.

REMEDIES: In the event of default, Lessor may at its option, (a) declare the entire

amount of the unpaid rental for the full balance of the term of the lease due and payable, without further notice, whereupon the same shall become immediately due and payable, (b) without demand or legal process and without being guilty of trespass or conversion and without thereby rendering the Lessor liable to refund any sums received as a deposit or as prepaid rent and without constituting a termination of the lease or relieving the Lessee of its original obligation, enter into the premises where the equipment may be found and take possession of same and remove same, whereupon all rights of Lessee in such equipment shall terminate absolutely and (c) retain all prior payments of rent and sell the same at public or private sale with or without notice to Lessee, with or without having the equipment at the sale, at which sale Lessor may purchase all or any part of the equipment or relet the equipment for a longer or shorter term than the original lease, the proceeds of such sale or reletting, less the expenses of retaking, storage, repairing, reselling

or reletting and attorney's fees as hereinafter defined, to be applied to the payment of the unpaid total rent for the balance of the term of this lease. Lessee shall remain liable for the balance of the unpaid rent. Lessee shall be liable for all expenses Lessor may incur in connection with the enforcement of any of its remedies herein, including without limitation, attorney's fees equal to 20% of the total unpaid balance or in any action to recover possession of Lessor's property, 20% of the value of said property. All remedies of Lessor hereunder are cumulative and may, to the extent permitted by the law, be exercised concurrently or separately, and the exercise of any one remedy shall not be deemed to be an election of such remedy or to preclude the exercise of any other remedy. No failure on the part of the Lessor to exercise, and no delay in exercising any right or remedy hereunder shall operate as a waiver thereof; nor shall any single or partial exercise by Lessor of any right or remedy hereunder preclude any other or further exercise of any other right or remedy. Whenever

any payment is not made when due hereinunder, the Lessee promises to pay to the Lessor or its assigns, not later than one month thereafter, an amount calculated at the rate of 12% per annum for such delayed payment and to make such payments as liquidated damages occasioned by such delay.

9. RISK OF LOSS: Lessee hereby assumes the entire risk of loss, from any and every cause whatsoever. In event of loss, Lessee at its expense and at Lessor's option shall either (a) repair the equipment, returning it to its previous condition, or (b) replace same with like equipment acceptable to Lessor and in good condition and equivalent value, which shall become the property of the Lessor, or (c) pay Lessor all unpaid rents or such unpaid rents as may be allocated to specific items of equipment. Upon replacement or payment, this lease shall terminate with respect to replaced or paid for equipment and Lessee shall take title to same on an as-is where-is basis. In case Lessee shall fail to repair, replace or pay for same, Lessor may repair at

Lessee's expense, to be charged as additional rental.

10. OTHER COVENANTS: Lessee agrees that its obligations under this lease are absolute, and shall continue in force and effect regardless of the disability of the Lessee to use the equipment because of any reason whatsoever, including but not limited to, wear, act of God, government regulations, strike, loss or damage, obsolescence; breach of contract or warranty; failure of, or delay in, delivery, misdelivery and that its obligations shall not abate due to any claim or setoff against Lessor. Lessee acknowledges Lessor is not the manufacturer of the equipment , nor manufacturer's agent. Lessee warrants that the application, statements and financial reports submitted by it to the Lessor are material inducements to the granting of this lease and that any material misrepresentations shall constitute default hereunder. Lessee agrees that Lessor has made no warranties or representations, express or implied, including the warranty of merchantability, with regard to the

equipment and that the equipment has been selected by the Lessee and is of a design, size, fitness and capacity selected by the Lessee and that the Lessee is satisfied that the same is suitable and fit for its purposes. Lessee agrees to procure for Lessor such estoppel certificates, landlord's and/or mortgagee's waivers or any other documents as Lessor or its assigns may reasonably request to effectuate the purposes of this lease. Lessee agrees to furnish its certified annual financial statements or any other information delivered by it to its banks, stockholders or other creditors and such other financial statements as the Lessor may require. Lessee agrees not to sublet or otherwise assign or transfer its rights and obligations hereunder without the written consent of Lessor, which consent shall not be unreasonably withheld, provided however that any consent to such assignment or transfer shall not release the Lessee from any liability hereunder. Lessee warrants that this lease has been

duly authorized, that no provision of this lease is inconsistent with Lessee's charter or by-laws or any loan or credit agreement or any other instrument to which Lessee is a party or which by Lessor or its property may be bound or affected. Lessee agrees that the Lessor may examine Lessee's books and financial records on due notice. Lessee hereby waives a trial by jury and the right to interpose any counterclaim or offset of any nature or description in any litigation between the Lessee and Lessor with respect to this lease, the property covered hereunder and the repossession hereof.

11. ASSIGNMENT: This lease or any equipment or any rents or other sums to become due hereunder may be transferred or assigned by Lessor without notice and in such event, Lessor's transferee or assignee shall have all rights, powers, privileges and remedies of Lessor hereunder and Lessee's obligations hereunder shall not be subject to

any defense, offset or counterclaim available to Lessee against Lessor. This lease is subject and subordinate to any mortgage which now or hereafter may affect the leased equipment, except that so long as the Lessee is not in default hereunder, the Lessee shall be entitled to peacefully and quietly hold, enjoy, possess and use such equipment during the term specified herein.

12. REDELIVERY: At the expiration of this lease, Lessee shall at its expense deliver equipment to the Lessor at an address specified by Lessor within the continental United States and in the same condition as received, less normal depreciation and wear.

13. RETURNABLE DEPOSIT: The Lessor ackowledges receipt of the sum set forth above as a returnable deposit from the Lessee to secure the faithful performance by the Lessee of all obligations of the Lessee under the lease. The parties agree that at any time the Lessee is in default, Lessor may apply all or any part of said deposit to the payment of

rentals due hereunder and should the Lessee fail to return any or all the equipment leased hereunder, the Lessor at its option, may elect to retain said deposit as liquidated damages.

14. ADDITIONAL SCHEDULES;AMENDMENTS: This lease and all additional leases shall be independent contracts, the rights and remedies thereunder arising severally; but any default on one lease shall be a default on all leases between the parties. Except as provided above, this lease contains the entire agreement between the parties, and may not be altered, modified, terminated or discharged except in writing. Where a noun form herein is inappropriate, the singular or plural form, whichever is appropriate, shall be deemed substituted therefor.

15. RENEWAL OPTIONS: Lessee shall have the option if Lessee is not in default hereunder, upon giving written notice to Lessor at least 30 days prior to the termination of the original or any renewal term of

this lease to renew this lease for such term and at such rental as is specified in the schedule, payable in advance at the beginning of each such term.

16. EXECUTION; LAWS GOVERNING; SERVICE: This lease shall only be binding when accepted by the Lessor at its West Hempstead, N.Y. office and shall be deemed to have been made in Nassau County, New York and shall be govened by the laws of the state of New York except for local recording statutes. As part of the consideration for the Lessor's executing this lease, Lessee agrees that all actions or proceedings arising directly or indirectly from this lease shall be litigated only in courts having situs within the State of New York and the Lessee hereby consents to the jurisdiction of any local, state or federal court located within the State of New York and waives personal service of any and all process upon the Lessee herein, and consents that all such service or process shall be made by certified

mail, return receipt requested, directed to the Lessee at the address hereinabove stated; and service so made shall be complete two (2) days after the same shall have been posted as aforesaid.

see 7 9

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